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5 UNITED STATES BANKRUPTCY COURT
6 NORTHERN DISTRICT OF CALIFORNIA

7 In re

8 LORNA KAYE NYS,

No. 02-11455

9 Debtor(s).
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11 LORNA KAYE NYS,

12 Plaintiff(s),

13 v.

A.P. No. 02-1162

14 CALIFORNIA STUDENT AID COMMISSION,
15 et al.,

16 Defendant(s).
17 _____/

18 Memorandum of Decision
19 _____

20 Debtor Lorna Nys is a 51-year-old woman living in Eureka, California. She has no serious
21 physical or mental conditions, nor are there any notable circumstances in her life other than a modest
22 income which make it particularly difficult for her to pay the \$85,000.00 in student loans at issue in this
23 adversary proceeding. She has no minor children or other dependants. She earns about \$40,000.00 per
24 year, which is a decent income for Eureka, but is not nearly enough to pay off her student loans and is the
25 most she can reasonably be expected to earn in the foreseeable future. She argues that these facts alone
26 constitute undue hardship, making the student loans nondischargeable pursuant to § 523(a)(8) of the
Bankruptcy Code.

1 Student loans are dischargeable if the debtor makes a three-pronged showing: that the debtor
2 cannot maintain a minimal standard of living if forced to repay the loans, that additional circumstances
3 make this state of affairs likely to persist for a significant portion of the repayment period, and that the
4 debtor has made a good faith effort to repay the loans. *In re Pena*, 155 F.3d 1108, 1111 (9th Cir. 1998).

5 Nys makes herself eligible for student loan discharge by writing the two words “additional
6 circumstances” out of the second prong of the test. In her interpretation of the law, undue hardship exists
7 any time the debtor cannot afford to pay the loans now or in the foreseeable future.¹ This is not a proper
8 interpretation of the law. In addition to mere inability to pay, there must be some additional
9 circumstance, such as serious illness, psychiatric problems, disability of a dependant, or *something*
10 which makes the debtor’s circumstances more compelling than those of an ordinary person in debt. *In re*
11 *Burrane*, 287 B.R. 490, 497 (9th Cir. BAP 2002). In *Pena*, for example, one of the debtors had a
12 serious, ongoing mental disability.

13 In this case, Nys is clearly incapable of repaying more than a portion of her student loans and this
14 situation will almost certainly persist for the foreseeable future. However, she has demonstrated no
15 additional circumstances beyond mere inability to pay. Like the debtor in *In re Brightful*, 267 F.3d 324,
16 330 (3rd Cir. 2001), she is intelligent, healthy, possessing useful skills, and has no extraordinary
17 expenses. Exceptional circumstances must be shown to meet the second prong of the *Brunner* test. *Id.*²
18 Nys has not demonstrated exceptional circumstances and therefore cannot discharge her student loans.

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20 ¹The court disregards as moot in this case the third prong, good faith efforts to repay, except to
21 note in passing that if Congress had intended a good faith element it would have included it, and it would
22 be contrary to the express language of the statute to deny discharge of a student loan after demonstrated
23 undue hardship just because the debtor had not made any payments. Inclusion of this prong requires the
24 court to listen to what can only be described as inadmissible settlement negotiations. Testimony in this
and other cases has convinced the court that some officials of the Ford Program are compassionless
number-crunchers and that determinations as to how much a debtor can afford to pay are much better left
to the courts.

25 ²In *In re Patterson*, 251 B.R. 866 (Bkrtcy.N.D.Cal. 2000), this court complained that there was
26 no exceptional circumstances requirement in the *Brunner* test. Subsequent cases, including *Brightful*
and *Burrane*, have made it clear that there is such a requirement.

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2 For the foregoing reasons, Nys shall take nothing by her complaint and judgment shall be issued
3 declaring that her student loans are not discharged. Defendant shall recover its costs of suit.

4 This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and
5 FRBP 7052. Counsel for defendant shall submit an appropriate form of judgment forthwith.

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8 Dated: August 11, 2003

9 Alan Jaroslovsky
U.S. Bankruptcy Judge
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